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Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel
24-28 March 2003

Provisional agenda of the Ad Hoc Committee

To be convened at United Nations Headquarters on Monday, 24 March 2003, at 10 a.m.

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of measures to enhance the existing protective legal regime for United Nations and associated personnel, including addressing the application of the Convention to all United Nations operations, taking into account the report of the Secretary-General (A/55/637) and the discussions in the Ad Hoc Committee.[1]
6. Adoption of the report.

[1] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 52* (A/57/52).

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Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel
24-28 March 2003

Draft report

Rapporteur: Mr. Daniel Kipkemei **Kottut** (Kenya)

Contents

		Paragraphs	*Page*
I.	Introduction	1–7	2
II.	Proceedings	8–9	3
III.	Discussions in the Working Group on measures to enhance the existing protective legal regime for United Nations and associated personnel	10–40	3
	A. General comments	10–16	3
	B. Comments on specific issues	17–40	5
	Removal of the requirement of a declaration of an exceptional risk	17–22	5
	United Nations operations	23–27	6
	Consideration of the proposal contained in document A/AC.264/2003/DP.1	28–36	7
	Consideration of the proposal contained in document A/AC.264/2003/DP.2	37–38	8
	Alternative means to extend the scope of application of the Convention	39–40	9

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I. Introduction

1. The Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, established by the General Assembly in its resolution 56/89 of 12 December 2001, was reconvened pursuant to paragraph 8 of General Assembly resolution 57/28 of 19 November 2002, to continue the discussion on measures to enhance the existing protective legal regime for United Nations and associated personnel, including addressing the application of the Convention to all United Nations operations, taking into account the report of the Secretary-General (A/55/637) and the discussions in the Ad Hoc Committee.[1] The Ad Hoc Committee met at United Nations Headquarters from 24 to 28 March 2003.

2. In accordance with paragraph 7 of resolution 56/89, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. In addition, pursuant to paragraph 8 of the resolution, the Secretary-General invited the International Committee of the Red Cross to participate as an observer in the deliberations of the Ad Hoc Committee.

3. The Vice-Chairman of the Ad Hoc Committee, Marcelo Vazquez (Ecuador), opened the session of the Ad Hoc Committee.

4. At its 3rd plenary meeting, on 24 March, the Ad Hoc Committee elected Christian Wenaweser (Liechtenstein) as the Chairman of the Committee to replace H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan) who was unable to serve as chairman. The Committee also elected Mahmoud Hmoud (Jordan) as Vice-Chairman to fill in a vacancy caused by resignation of Elana Geddis (New Zealand). Other members of the Bureau remained the same as at the previous session. The Bureau was thus comprised of the following members:

Chairman:

Christian Wenaweser (Liechtenstein)

Vice-Chairpersons:

Mahmoud Hmoud (Jordan)
Ioana Gabriela Stancu (Romania)
Marcelo Vazquez (Ecuador)

Rapporteur:

Daniel Kipkemei Kottut (Kenya)

5. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Mahnoush H. Arsanjani, Deputy Director of the Division, acted as Deputy Secretary of the Ad Hoc Committee and Secretary to its Working Group of the Whole. The Codification Division provided the substantive services for the Ad Hoc Committee and its Working Group.

6. At the 3rd plenary meeting, the Ad Hoc Committee adopted the following agenda (A/AC.264/L.4):

1. Opening of the session.
2. Election of officers
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of measures to enhance the existing protective legal regime for United Nations and associated personnel, including addressing the application of the Convention to all United Nations operations, taking into account the report of the Secretary-General (A/55/637) and the discussions in the Ad Hoc Committee.[1]
6. Adoption of the report.

7. The Committee had before it General Assembly resolution 57/28, the report of the Committee on the work of its 2002 session,[2] the report of the Secretary-General entitled "Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel" (A/55/637), as well as proposals submitted by New Zealand,[3] Pakistan[4] and Greece on behalf of the European Union.[5]

II. Proceedings

8. At its 3rd plenary meeting, the Ad Hoc Committee adopted its organization of work and decided to continue its deliberations in a Working Group of the Whole. The Working Group held six meetings, from 24 to 26 March. At its 4th plenary meeting, on 28 March 2003, the Committee adopted its report.

9. At the 4th meeting of the Working Group, on 25 March, delegates were briefed by representatives of the Office of Legal Affairs, the Office of the United Nations Security Coordinator, the Office for the Coordination of Humanitarian Affairs and the Office of the United Nations High Commissioner for Refugees on recent developments and practical and legal issues encountered by the United Nations in ensuring the safety and security of its personnel. The briefing was followed by a question-and-answer session.

III. Discussions in the Working Group on measures to enhance the existing protective legal regime for United Nations and associated personnel

A. General comments

10. It was generally agreed that every effort should be made to strengthen the safety and security of United Nations and associated personnel, which were of major concern to the international community. It was noted that currently only a limited number of States were party to the 1994 Convention on the Safety of United Nations and Associated Personnel and that steps should be taken to encourage more States to ratify or accede to the Convention. The Secretary-General, for example, might

request States to report on the measures they have taken to become party to the Convention.

11. It was noted that despite the measures adopted by the United Nations, local staff of its offices and the staff of the humanitarian agencies and non-governmental organizations continued to be targeted. Concerns were expressed that since the previous session of the Ad Hoc Committee, a number of United Nations and associated personnel had lost their lives while carrying out duties on behalf of the international community and that only in a few instances were the perpetrators of crimes against such personnel brought to justice.

12. Delegations expressed their satisfaction with the progress made at the fifty-seventh session of the General Assembly and the adoption of Assembly resolution 57/28, endorsing a number of short-term measures that had been proposed by the Secretary-General to strengthen the existing protective regime of the Convention. It was further emphasized in that regard that the inclusion of key provisions of the Convention in the status-of-forces, status-of-mission and host country agreements, as recommended in paragraph 3 of the resolution, was a practical measure towards ensuring the safety of United Nations and associated personnel. Similarly, support was also expressed for the preparation of model or standardized provisions by the Secretary-General for incorporation into agreements concluded between the United Nations and humanitarian non-governmental organizations or agencies.

13. The views of delegations varied, however, with respect to the extent of enhancement and the means to achieve it.

14. With respect to the extent of enhancement, some delegations proposed that the scope of the 1994 Convention should be extended to all United Nations operations and presences, including field mission offices, regardless of the risk involved in their activities. However, other delegations were of the view that the element of risk was fundamental in the Convention and therefore should be retained.

15. With respect to the means to achieve the enhancement of the protective legal regime under the Convention, the views were divided between proponents and opponents of the extension of the Convention to all United Nations operations. Those delegations proposing the extension of the Convention to all United Nations operations suggested eliminating the requirement of a declaration of an exceptional risk contained in article 1 (c) (ii) of the Convention. The delegations against such an extension suggested achieving the enhancement of the legal regime of the Convention by implementing practical measures, including those enumerated in the relevant paragraphs of General Assembly resolution 57/28.

16. The delegations had before them the proposals contained in documents A/AC.264/2003/DP.1, A/AC.264/2003/DP.2 and A/AC.264/2003/DP.3. The proposal in A/AC.264/2003/DP.1 included a draft protocol to the Convention to provide for the automatic application of the Convention to all United Nations operations or presences. The proposal in A/AC.264/2003/DP.3 contained amendments to articles 1 and 2 of the proposal in A/AC.264/2003/DP.1. The proposal in A/AC.264/2003/DP.2 contained the text of a recommendation to be made by the Ad Hoc Committee to the Secretary-General with respect to the initiation by him of a declaration of an exceptional risk by the Security Council or the General Assembly.

B. Comments on specific issues

Removal of the requirement of a declaration of an exceptional risk

17. In proposing the extension of the Convention to all United Nations operations by removing the requirement of a declaration of an exceptional risk, some delegations noted that, since 1999, the number of deaths of staff of non-peacekeeping missions was three times as great as that of civilian members of peacekeeping missions. Thus, although the non-peacekeeping staff were as vulnerable as peacekeeping personnel, they fell outside the automatic application of the Convention. It was stated that that limitation of the Convention had particular implications for personnel of United Nations funds, programmes and agencies operating in the field such as the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the World Food Programme and similar humanitarian organizations, most of which were engaged in operations that were not covered by the Convention and in many cases were targeted precisely to prevent humanitarian relief. Those delegations stressed that the "trigger" mechanism envisaged in the Convention had proved to be inadequate and non-operational and had made the application of the Convention discriminatory. It was stated that the mechanism could not be implemented for a number of reasons. First of all, it would be unrealistic to expect the Secretariat of the United Nations or States to foresee risky situations; a situation could deteriorate rapidly and procedural flaws would make it impossible to ensure the timely declaration of a risk. Secondly, political aspects and possible effects of a declaration, including political sensitivity for a host country and difficulties with deploying personnel, would prevent the organs concerned from declaring an exceptional risk. There were cases where the mechanism should have been applied but had not. In that regard, support was expressed for the proposal contained in document A/AC.264/2003/DP.1.

18. Nonetheless, other delegations noted that not all United Nations operations faced the same risk and therefore not all of them should be equally covered by the Convention. It was stated that the Convention was intended to apply to high-risk operations and that it might be feasible to establish a set of benchmarks that, if met, would facilitate requesting a declaration of exceptional risk. Those delegations were of the view that it was premature to draw the conclusion that the mechanism envisaged in the Convention was inadequate and non-operational in the absence of any attempt on the part of the Secretary-General to effectively initiate a declaration procedure in the relevant organs of the United Nations. The same delegations stated that the Secretary-General should be encouraged to play an active role in initiating a declaration of an exceptional risk in the relevant organs as a matter of routine.

19. Since it was impossible to define risk, article 1 (c) (ii) of the Convention helped to identify criteria for establishing an exceptional risk in the field. The removal of that element would create a different political and legal scenario, an overlap with other legal regimes, such as the regimes created under the 1946 Convention on the Privileges and Immunities of the United Nations and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Furthermore, it would increase the legal burden for host States parties to the Convention, in particular as regards article 8 of the 1994 Convention. In response, it was noted by some delegations that emphasis on the notion of "risk" was flawed, since "risk" did not always correspond to "vulnerability", which was equally relevant in the assessment of an effective

protective regime. In addition the expansion of the scope of the Convention would not place any extra burden on States parties. Application of specific provisions of the Convention had to be assessed in a particular factual situation. If there were no special circumstances leading to believe that United Nations or associated personnel were or could be targeted, no additional action was required of the host Government. Those delegations did not see any problem with overlapping obligations of the host Government under other multilateral agreements. One way of addressing that concern was through host country or headquarter agreements.

20. Some delegations expressed the view that, in the light of the existing political will of States, the most practical and realistic way to proceed was to enhance and strengthen the safety of United Nations and associated personnel within the existing regime of the Convention, in particular by implementing the short-term measures enumerated in General Assembly resolution 57/28.

21. On the other hand, other delegations were of the view that implementation of short-term and long-term measures was not mutually exclusive. However, while short-term measures were important and necessary, they were not sufficient since they did not eliminate the requirement of a declaration of an exceptional risk.

22. The view was expressed that elimination of the trigger mechanism might become an impetus for certain States to adhere to the Convention. However, other delegations were of the view that any modification of the Convention might disturb the compromise achieved in the Convention at the time of its adoption and hinder the ratification process.

United Nations operations

23. Delegations agreed that all United Nations and associated personnel facing risk should be adequately protected by the Convention. As regards the inclusion of operations other than those foreseen under article 1 (c) (i) within the scope of application of the Convention, the view was expressed that that could be achieved by making such a specification in the mandates of the operation, thus obviating the need for a declaration of an exceptional risk. The point was also made that, in the absence of a legal definition of peacekeeping as opposed to peace-building operations, the Convention could be applied to both with flexibility and without the requirement of a declaration of exceptional risk.

24. It was noted that the use of the word "presences" in the proposal contained in document A/AC.264/2003/DP.1 had been taken from paragraph 7 of the report of the Secretary-General (A/55/637) and sought to cover, for example, field offices which, unlike United Nations operations, were not established for a specific duration; thus permanent offices, like United Nations information offices, would be excluded.

25. In the light of the lack of a legal definition of "presences" and the ensuing doubts regarding the concept, it was suggested that one possible way out was to interpret "United Nations operations" in a broader manner than previously, so as to encompass those cases which the use of the word "presences" attempted to cover. According to another view, the discussion could move forward by having a common understanding on what was meant by the word "presences". In that regard, paragraph 7 of the report of the Secretary-General constituted an important basis for reaching such an understanding; thus the concept would include United Nations political missions, "post-conflict, peace-building offices" and United Nations

humanitarian, development and human rights presences, as well as those offices established by agencies, programmes and funds of the United Nations system.

26. Nonetheless, the point was made that the criteria for determining what "presences" should fall under the scope of the Convention and which ones should not was not clear. The list in paragraph 7 of the report of the Secretary-General was non-exhaustive. For example, would the criteria require that they be field missions or would it suffice for them to have an affiliation with the United Nations? In that connection, it was stated that it was necessary to look at the empirical context.

27. The point was also made that, irrespective of whatever was agreed to as being encompassed by the term "presences", it was fundamental that the element of being under United Nations control and authority should also be applied.

Consideration of the proposal contained in document A/AC.264/2003/DP.1

28. In introducing the proposal, the delegation of New Zealand noted that it contained a draft optional additional protocol aimed at extending the application of the Convention to all United Nations operations by removing the "trigger" mechanism. Article 1, paragraph 1, of the protocol, drafted along the lines of the Secretary-General's recommendation contained in paragraph 30 of his report (A/55/637), would replace article 1 (c) of the Convention. Article 1, paragraph 2, and article 2 sought to clarify the relation between the protocol and the Convention. It was not the intention to alter the definition of United Nations personnel or article 2 of the Convention dealing with the enforcement measures under Chapter VII of the Charter of the United Nations.

29. Some support was voiced for the thrust of the proposal. Some drafting changes were suggested, in particular to delete article 2 and replace article 1 with the text contained in A/AC.264/2003/DP.3. Further drafting suggestions were proposed to the text of article 1 as contained in document A/AC.264/2003/DP.3: to replace "United Nations operations or presences" with "United Nations operations and presences", and the word "consistent" with "in accordance".

30. On the other hand, the view was expressed that in an attempt to extend the scope of application of the Convention to all United Nations operations, the focus should be placed on the elimination of the trigger mechanism rather than redefining the term "United Nations operations". The definition should essentially remain as in the Convention and no additional qualifiers, such as "presences" in the proposed protocol, should be added.

31. Some delegations opposed the consideration by the Ad Hoc Committee of the proposal. They noted that it was premature to embark upon a drafting exercise before the effectiveness of short-term measures was tested and before consensus was reached on the need to extend the scope of the application of the Convention. In their view, the enhancement of the protection of the United Nations and associated personnel required taking practical steps for the implementation of the Convention, such as: (a) achieving the universality of the Convention; (b) including key provisions of the Convention in status-of-forces, status-of-mission and host country agreements to bind host States which were not parties to the Convention; (c) vigorous measures by the responsible officials of the Secretariat to pursue enforcement of the Convention with the aim of eliminating impunity for the crimes

committed against United Nations and associated personnel; and (d) allocating more resources to the training of United Nations personnel.

32. However, other delegations were of the view that the proposal was both timely and a good starting point for constructive and focused discussion to fulfil the mandate of the Ad Hoc Committee. It was noted that, by General Assembly resolution 57/28, the Committee was specifically entrusted with addressing the application of the Convention to all United Nations operations. Since the proposal aimed at applying the Convention to all United Nations operations, it was within the mandate of the Committee to discuss it.

33. The opposing view, however, was that the mandate of the Ad Hoc Committee, as defined by the resolution, was to address measures to enhance the existing protective legal regime for United Nations and associated personnel. The proposal therefore fell outside the scope of the Committee's mandate since it did not intend to enhance the existing regime but rather sought to create a new regime.

34. Furthermore, some delegations felt that, since the proposal aimed at amending the Convention, the Ad Hoc Committee was not the proper forum to discuss it. In that context, reference was made to a review meeting envisaged in article 23 of the Convention, as well as to the procedure for amendment of multilateral treaties provided for in article 40 of the Vienna Convention on the Law of Treaties.

35. However, other delegations stressed that the proposal did not aim at amending the Convention, but rather at creating a parallel regime for the higher protection of United Nations and associated personnel that would be binding only upon those States willing to adhere to it; accordingly, it was stated that the Committee constituted a proper forum to consider the proposal.

36. Questions were raised with respect to the simplified procedure envisaged in article 5 of the proposal. The suggestion was made to delete article 5 and to include in article 6 of the proposal definitive signature as one of the means of expressing consent to be bound by the protocol, in accordance with article 12 (1) (a) of the Vienna Convention on the Law of Treaties.

Consideration of the proposal contained in document A/AC.264/2003/DP.2

37. It was noted by some delegations that the proposals contained in documents A/AC.264/2003/DP.1 and A/AC.264/2003/DP.2 were not mutually exclusive and could be considered together. While the latter was regarded as a short-term measure aimed at improving the existing regime, the former was a long-term measure aimed at extending the application of the Convention.

38. Some delegations noted that a recommendation similar to that in the proposal had been made in paragraph 4 of General Assembly resolution 57/28 and therefore questioned the need to repeat it. Nevertheless, other delegations noted that it would be worthwhile to consider the proposal to reinforce the recommendation made to the Secretary-General in resolution 57/28. Some delegations found it difficult to support the proposal because it did not eliminate flaws in the application of the Convention caused by the "trigger" mechanism. In considering the proposal, the need to examine closely the prerogatives of the Secretary-General under the Charter of the United Nations was emphasized.

Alternative means to extend the scope of application of the Convention

39. As an alternative to an optional protocol, the suggestion was made that a stand-alone instrument should be drafted that would include some provisions of the Convention while updating certain provisions in the light of the relevant treaties adopted recently, such as the International Convention for the Suppression of Terrorist Bombings and International Convention for the Suppression of the Financing of Terrorism. Some support was expressed for the suggestion.

40. It was noted that a number of important issues had been raised in the discussion of the Ad Hoc Committee which should be reflected on by delegations and discussed further in detail. It was noted in that context that the General Assembly should give the Committee a separate and specific mandate for such an endeavour.

Notes

[1] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 52* (A/57/52).

[2] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 52* (A/57/52).

[3] A/AC.264/2003/DP.1

[4] A/AC.264/2003/DP.2

[5] A/AC.264/2003/DP.3